Guideline Sentencing Update

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Determining the Sentence

"Safety Valve" Provision

Fifth Circuit holds that statements to a probation officer do not satisfy requirement to provide information "to the Government." Defendant faced a ten-year mandatory minimum sentence after pleading guilty to a drug conspiracy charge. He requested application of 18 U.S.C. §3553(f), which allows sentencing under the Guidelines without regard to the mandatory minimum. USSG §5C1.2 incorporates §3553(f) into a guideline, and subsection (5) requires the defendant to have "truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The probation officer interviewed defendant in preparation of the presentence report, but neither defendant nor the probation officer spoke to the government's case agent. The court gave defendant an opportunity to do so, but defendant refused. The court declined to apply §5C1.2 and sentenced defendant to the mandatory minimum.

Defendant argued on appeal that his discussion with the probation officer satisfied the requirement to disclose to the Government all information he knew about the criminal offense because the probation officer is, for purposes of §5C1.2, "the Government." The appellate court disagreed and affirmed the sentence. "In the context of the sentencing hearing, [Fed. R. Crim. P.] 32(c) uses 'Government' in conjunction with 'attorney' or 'counsel.' By the use of *in pari materia*, the Government argues that we should construe 'Government' in §5C1.2 the same way. The Government's position is supported by §5C1.2's explicit cross reference to Rule 32. *See* §5C1.2 commentary n.8. We agree with the Government and the district court that the probation officer is, for purposes of §5C1.2, not the Government. The purpose of the safety valve provision was to allow less culpable defendants who fully assisted the Government to avoid the application of the statutory mandatory minimum sentences. . . . A defendant's statements to a probation officer do not assist the Government."

U.S. v. Rodriguez, 60 F.3d 193, 195–96 (5th Cir. 1995).

First Circuit holds that defendant must make "affirmative act of cooperation" in providing "information and evidence" to government under §3553(f)(5). The "safety valve" provision in 18 U.S.C. §3553(f) requires, inter alia, that "(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." Although defendant did not directly speak with the government, he argued that he effectively provided the required information because his discussion of the crime with his coconspirators had been recorded by an undercover agent and, when pleading guilty, he admitted to the facts presented by the government at the plea hearing. The district court refused to apply §3553(f).

The appellate court affirmed. "Whatever the scope of the 'information and evidence' that a defendant must provide to take advantage of section 3553(f)(5), we hold that a defendant has not 'provided' to the government such information and evidence if the sole manner in which the claimed disclosure occurred was through conversations conducted in furtherance of the defendant's criminal conduct which happened to be tape-recorded by the government as part of its investigation. . . . Nor does it suffice for the defendant to accede to the government's allegations during colloquy with the court at the plea hearing. Section 3553(f)(5) contemplates an affirmative act of cooperation with the government no later than the time of the sentencing hearing. Here, Wrenn did not cooperate . . . . And when the court offered to postpone sentencing so Wrenn could make a proffer to the government for purposes of section 3553(f)(5), he refused."

U.S. v. Wrenn, No. 94-2089 (1st Cir. Sept. 25, 1995) (Lynch, J.).

See *Outline* generally at V.F.

Violation of Supervised Release

Sixth Circuit holds that amended statutory language does not require courts to follow revocation policy statements. The Violent Crime Control and Law Enforcement Act of 1994, effective Sept. 13, 1994, amended 18 U.S.C. §3553(a)(4) to state that courts "shall consider . . . (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission." Defendant argues that this amendment indicates that Congress intended that courts must now impose sentence following revocation of probation or supervised release in accordance with the Chapter 7 policy statements in the Guidelines. After his supervised release was revoked he was subject to a 3–

9-month term under §7B1.4(a), but the court thought that was too lenient and sentenced defendant to the two-year statutory maximum.

The appellate court affirmed, finding that the amendment did not change the current holding of all circuits that Chapter 7 policy statements must be considered but are not mandatory. Courts are required by 18 U.S.C. §3553(b) to follow *guidelines*, but "[a]bsent any applicable guidelines, the mandatory language of §3553(b) does not apply." Chapter 7 consists of policy statements only, without accompanying guidelines, that are intended to provide "greater flexibility to . . . the courts." *See* USSG Ch.7, Pt.A.3(a), intro. comment. "Therefore, because there are not any guidelines for the policy statements to interpret or explain, the mandatory language of §3553(b) does not apply. On a plain reading of amended §3553(a), a court is required to 'consider' the policy statements in Chapter 7 in imposing a sentence for supervised release violation. Defendant argues that in amending §3553 Congress only could have intended to make the policy statements mandatory. [There are] two other possible purposes: To make explicit that when the Commission does issue guidelines pertaining to the revocation of supervised release, those guidelines will be as binding as other sentencing guidelines; and to affirm the principle recognized by the Sixth Circuit that a court must consider the Chapter 7 policy statements when sentencing a defendant for violation of the conditions of supervised release. Defendant's conclusion about Congressional purpose does not follow from the wording of the amendment or reasoning of the cases. . . . Until the Sentencing Commission changes the policy statements in Chapter 7 to guidelines or Congress unequivocally legislates that the policy statements in Chapter 7 are binding, this Court will not reduce the flexibility of the district courts in sentencing supervised release violators."

U.S. v. West, 59 F.3d 32, 35–36 (6th Cir. 1995).

See *Outline* at VII.

Departures

Substantial Assistance

Ninth Circuit holds that government may not refuse §5K1.1 motion because defendant exercised right to trial. Defendant pled guilty to drug charges pursuant to a plea agreement in which he agreed to cooperate with the government. He faced a sentencing range of 235–293 months, but the government made a §5K1.1 motion and the district court sentenced him to 144 months. However, before sentencing, defendant had moved to withdraw his guilty plea and the court had denied the motion. After sentencing, the government agreed to allow defendant to withdraw his plea. The government tried to persuade defendant to forego a trial by offering to recommend a one-year sentence reduction if he pled guilty and, conversely, stating that if defendant went to trial it would "present additional charges to the Grand Jury and would not recommend [a §5K1.1] reduction." Defendant insisted on going to trial and was found guilty. He received a 188-month sentence after the government refused to make a §5K1.1 motion and the district court refused to depart. Defendant argued on appeal that the government's refusal to file was "in retaliation for his choice to exercise his constitutional right to a jury trial."

The appellate court agreed that "[t]he record supports this contention. . . . While it is undoubtedly true both that the government does not have to make a substantial assistance motion every time a defendant is cooperative and that the government may use the motion as a carrot to induce a defendant to make a plea, that is not what transpired in this case. Here, the government initially took the position at sentencing that the defendant had offered substantial assistance and made the appropriate motion, and then threatened to change its position to discourage the defendant from going to trial. . . . Mr. Khoury has presumptively established that the government has withdrawn its §5K1.1 motion because he forced them to go to the trouble of proving their case before a jury, as was his constitutional right. The government has pointed to no intervening circumstances that diminished the usefulness of what they previously considered to be substantial assistance. We therefore conclude that Mr. Khoury has made the 'substantial threshold showing' [of an unconstitutional motive] required by *Wade* [*v. U.S.*, 504 U.S. 181 (1992)]." On remand the district court should "exercise its discretion and consider the appropriate Guideline factors relating to a §5K1.1 motion."

U.S. v. Khoury, 62 F.3d 1138, 1140–42 (9th Cir. 1995) (Fernandez, J., dissenting). *Accord U.S. v. Paramo*, 998 F.2d 1212, 1219–21 (3d Cir. 1993) (may not deny §5K1.1 motion to penalize defendant for exercising right to trial).

See *Outline* at VI.F.1.b.iii.

Offense Conduct

Calculating Weight of Drugs

Fourth Circuit holds that amended LSD calculation applies to "liquid LSD." Defendant was convicted of LSD offenses that involved LSD dissolved on blotter paper and in a liquid solvent, and his sentence was based on the total weight of the mixtures. After the 1993 amendment to the LSD calculation (Amendment 488), he moved for resentencing. The district court applied the new method to the LSD on blotter paper but not to the liquid, reasoning that "in calculating the Guidelines involving liquid LSD, the 0.4 mg conversion factor should not be used because there is no carrier medium involved." The change in the weight of the blotter paper LSD was too small to lower the offense level, so defendant's sentence was not changed and he appealed, arguing that his offense level should be deter-

mined by calculating the number of doses in the liquid and then using the 0.4 mg per dose conversion factor of the amendment.

The appellate court remanded. Although Amendment 488 focuses on doses of LSD "on a blotter paper carrier medium" and did not provide a specific calculation for liquid LSD, there is a reference to it in §2D1.1, comment. (n.18): "In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted." The court determined "that the Commission intended 'liquid LSD' to refer to pure LSD dissolved or suspended in a liquid solvent, the form of LSD at issue in this case," and "did not intend 'liquid LSD' to refer to pure LSD because the Guidelines readily distinguish between drugs contained in an impure mixture or substance and drugs in 'pure' or 'actual' form." However, "[b]y defining pure LSD dissolved or suspended in a liquid solvent as 'LSD not placed onto a carrier medium,' Amendment 488 interprets the liquid solvent as not to be an LSD carrier medium for Guidelines purposes," leading the court to conclude that the 0.4 mg per dose calculation for paper carrier media is "inapplicable to liquid LSD." Instead, "Amendment 488 dictates that, in cases involving liquid LSD, the weight of the pure LSD alone should be used to calculate the defendant's base offense level . . . . [T]he plain language of the amendment supports this interpretation because Application Note 18 expressly authorizes the use of 'LSD alone' in cases involving liquid LSD," and the reference to upward departure "would be unnecessary had the Commission not intended courts to use the weight of the LSD alone in calculating a defendant's base offense level."

The court thus held that the offense level must be based on either the weight of pure LSD in the liquid or the number of doses contained in the liquid multiplied by 0.05 mg (the Drug Enforcement Administration's standard dosage unit for LSD referenced in §2D1.1's Background Commentary)—"we conclude that using the 0.05 mg factor is consistent with our conclusion above that the liquid solvent in liquid LSD is not a carrier medium for Guidelines purposes and with Amendment 488's primary approach that courts should use the weight of the LSD alone, and not the weight of the LSD and its liquid solvent or any potential carrier medium." "As in using the weight of the pure LSD, the court remains free to depart upward if it determines that using the 0.05 mg conversion factor does not reflect the seriousness of Turner's offense." Because the issue was not addressed below, the court added that it "need not decide whether [to] use the entire weight of the liquid LSD or some other weight in applying any statutory minimum sentence."

U.S. v. Turner, 59 F.3d 481, 484–91 (4th Cir. 1995).

See *Outline* at II.B.1.

Seventh Circuit holds that drugs purchased for personal use are included for sentencing on drug distribution conspiracy. Defendant pled guilty to conspiracy to possess with intent to distribute and to distribute cocaine. An admitted cocaine addict, he argued that approximately half of the cocaine he purchased from his supplier should not be included in calculating his offense level because it was for his personal use rather than for distribution. *See U.S. v. Kipp*, 10 F.3d 1463, 1465–66 (9th Cir. 1993) [6 *GSU* #9]. The district court disagreed and sentenced defendant on the full quantity of cocaine that he had purchased.

The appellate court affirmed, finding that its decision was controlled by *Precin v. U.S.*, 23 F.3d 1215, 1219 (7th Cir. 1994) (affirming inclusion of cocaine that defendant received for personal use as "commission" from sales for another conspirator—"Any cocaine which Precin received for his personal use was necessarily intertwined with the success of the distribution"). *Accord U.S. v. Brown*, 19 F.3d 1246, 1248 (8th Cir. 1994); *U.S. v. Innamorati*, 996 F.2d 456, 492 (2d Cir. 1993). The court concluded that all of the drugs were part of the "same common scheme or plan"—all the cocaine came from the same supplier, "was not divided into packages for distribution and packages for personal use, . . . [and] the amount that Snook personally consumed directly affected the conspiracy—the more Snook used, the more he had to sell to bankroll his habit." The court distinguished *Kipp* because that case did not involve a conspiracy—the offense of conviction there was possession with intent to distribute, and "the court decided that only the amount of drugs that the defendants intended to distribute was 'part of the same course of conduct or common scheme or plan.'"

U.S. v. Snook, 60 F.3d 394, 395–96 (7th Cir. 1995).

See *Outline* at II.A.1.

Loss

Seventh Circuit holds that interest due on a loan may be included in loss calculation. Defendant was convicted of offenses involving a series of fraudulent loans. In determining the amount of loss involved, the district court included the interest that defendant had agreed to pay on the loans. Defendant appealed, arguing that §2F1.1, comment. (n.7), states that loss "does not . . . include interest the victim could have earned on such funds had the offense not occurred."

The appellate court affirmed, agreeing with the circuits that have held that the exclusion of interest in Note 7 "refers to speculative 'opportunity cost' interest—the time value of money stolen from the victims. . . . It does not refer to a guaranteed, specific rate of return that a defendant contracts or promises to pay." The court added that "Note 7 states that loss is the value of the thing stolen—money, property, or services. In the context of a

loan agreement, the thing itself, or property, includes both the principal and the agreed-upon interest. But for the promise to pay interest, the bank would not have made the loan. The interest Allender challenges here could therefore properly be considered part of the property itself for purposes of Note 7. But even if it is properly deemed 'interest' under this Note, the language allows for a distinction to be made between the types of interest based on the level of certainty with which the interest was due. The Note uses the phrase 'interest the victim *could have* earned on such funds.' Inherent in this phrasing is a degree of speculation that is usually associated with mere investment opportunities—the time value of money. But where there is an enforceable agreement to pay a calculable sum, all speculation disappears. If this was the kind of interest contemplated by Note 7, the commentary drafters would likely have used different language, perhaps the phrase 'interest the victim *would have* earned.' They did not, and therefore we think that the only 'interest' properly excluded from the loss calculations here is the opportunity cost value of the item stolen."

The court noted that this decision conflicted with a recent decision by another panel in *U.S. v. Clemmons*, 48 F.3d 1020, 1025 (7th Cir. 1995), which held that under Note 7 interest promised to defrauded investors should not be included as loss. The current opinion was circulated among all active judges in the circuit and "[a] majority of the court has . . . agreed that *Clemmons* should be overruled to the extent that it conflicts with the holding in this opinion."

U.S. v. Allender, 62 F.3d 909, 917 (7th Cir. 1995).

See *Outline* at II.D.2.d.

Certiorari granted:

U.S. v. Koon, 34 F.3d 1416 (9th Cir. 1994), *cert. granted*, 64 U.S.L.W. 3199 (U.S. Sept. 27, 1995) (No. 94-1664). "Question presented: Is district court's downward departure from prescribed range of Sentencing Guidelines on basis of factors not expressly prohibited as grounds for departure to be reviewed under de novo standard applied by court below or under deferential standard set forth in *U.S. v. Rivera*, 994 F.2d 942 (1st Cir. 1993), and other cases?" Certiorari was also granted in a companion case, *Powell v. U.S.*, No. 94-8842 (U.S. Sept. 27, 1995), "to resolve sharp conflict among federal courts of appeals in essential approach to reviewing departures under federal Sentencing Guidelines, and in correct analysis of particular categories of downward departure involved in this case." *See also* 7 *GSU* #2; *Outline* at VI.C.3 and VI.C.4.b.

Opinion withdrawn:

U.S. v. Garza, 57 F.3d 950 (10th Cir. 1995), was withdrawn from publication Sept. 6, 1995, after a joint motion to dismiss the appeal was granted and the judgment vacated. Parts of the opinion were included in the upcoming September 1995 *Outline* (currently being printed with distribution expected after Oct. 23). The references to *Garza* in sections VI.C.5.c and VI.F.1.b.i should be deleted.

Correction:

The pending amendment to §2D1.1, which requires the use of number of pills rather than gross weight for certain controlled substances, will *not* be retroactive as is stated in the September 1995 *Outline*. Please delete that statement at the top of page 31 in section II.B.1.

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